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CONFIDENTIAL SETTLEMENT COMMUNICATION PROTECTED UNDER FED. R. EVID. 408

VIA EMAIL AND FEDERAL EXPRESS

Andrew Helmlinger
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Re: Yerington Mine Site, Lyon County, Nevada, Site ID #09GU
Atlantic Richfield Company Response to EPA's May 13, 2015 Payment Demand

Dear Andrew:

This letter responds to EPA's May 13, 2015 demand for reimbursement of CERCLA response costs incurred at the Yerington Mine site (the "Site"). Atlantic Richfield Company ("Atlantic Richfield") will agree at this time to reimburse EPA for some, but not all, of its documented expenditures. Atlantic Richfield is offering to pay EPA $1,445,639.32, which amount covers 100% of EPA's documented unreimbursed response costs for OUs 2-7, and 50% of its costs for OU1. For the reasons discussed in this letter, we believe this is a reasonable and fair approach, which provides EPA with ample payment pending completion of the Remedial Investigation / Feasibility Study, while also accounting for the potential liability under CERCLA of parties other than Atlantic Richfield for releases of hazardous substances at the Site. We have previously discussed our position with respect to Atlantic Richfield's liability for groundwater contamination in OU1, and we briefly explain our rationale for partial payment of EPA's OU1 cost in Section IV below. In addition to resolving EPA's claim for past response costs, Atlantic Richfield also wants to use this opportunity to open a discussion with EPA about responsibility for operation and maintenance of the Arimetco Fluid Management System and the mounting costs of that work.

I. EPA'S DEMAND

EPA's May 13, 2015 demand letter requests payment in the amount of $2,838,175.81 for unreimbursed response related to OUs 1 and 2-7 as of December 31, 2013. We understand that this amount is in error, and the actual payment demand is for $2,099,083.06. The difference

reflects a deduction of $739,092.75, which is the amount reportedly paid to NDEP in connection with the construction of the OU8 "Plus-Two" Ponds in 2013, plus the associated indirect costs (calculated at 45.96%).

EPA refers in its letter to the January 12, 2007 Unilateral Administrative Order, Dkt. No. 9-2007-0005 (the "UAO") as establishing the basis for Atlantic Richfield's liability for certain of Site-related response costs. EPA issued the UAO pursuant to its authority under CERCLA Section 106(a), 42 U.S.C. § 9606(a). However, nothing in § 106(a) authorizes EPA to order a potentially responsible party to reimburse EPA for its response costs, which can only be recovered, if at all, through a separate civil action. Atlantic Richfield reserves the right to contest both the assertion and the amount of any response costs claimed by EPA in any such action.

II. ATLANTIC RICHFIELD'S SETTLEMENT OFFER

To resolve EPA's payment demand without the need for a cost recovery action, Atlantic Richfield offers to pay (i) 100% of EPA's documented response costs incurred, not inconsistent with the national contingency plan (the "NCP"), with respect to OUs 2-7 for the period January 1, 2012 through December 31, 2013; and (ii) 50% of EPA's documented response costs incurred, not inconsistent with the NCP, with respect to OU1 for the period January 1, 2010 through December 31, 2013.

Based on the amounts stated in EPA's payment demand and the enclosed cost summaries, Atlantic Richfield's settlement payment offer is:

OU1:	$1,306,969.05 x 0.5 = $653,484.52
OU0, 2-7:	$792,114.01
Total:	$1,445,598.53

Atlantic Richfield would also consider extending the same 50% payment allocation to future OU1 response costs incurred through the completion of the RI/FS. This would ensure a steady stream of future payments to EPA, which would seem to be a valuable benefit at a site where access to Superfund monies is not currently available. Atlantic Richfield does not expect to receive a covenant not to sue or contribution protection for unpaid OU1 costs.

This, of course, is not the first time that Atlantic Richfield has disputed its obligation to pay for OU1 response costs. Under the August 2013 Administrative Settlement Agreement for Response Costs, Dkt. No. 092013-0005, EPA accepted payment only for its OUs 2-7 costs and reserved its rights with respect to the full amount of the (unpaid) OU1 costs. We are simply looking for a similar accommodation now—albeit one more favorable to EPA.

Atlantic Richfield's payment proposal has precedent at another Region IX site—the Leviathan Mine site in Alpine County, California. There, EPA and Atlantic Richfield entered into an administrative settlement and order on consent in 2009 providing for a very similar payment allocation approach to what we are proposing here: Atlantic Richfield pays 100% of EPA's response costs for oversight of work performed by Atlantic Richfield pursuant to the consent order, 50% of EPA's response costs for oversight of other categories of work at the site, and none of EPA's response costs for direct oversight of the State of California's work (the other viable PRP). To the best of Atlantic Richfield's knowledge, EPA is not recovering its remaining response costs from the State of California. Despite that, this allocation approach has worked well for six years. The Leviathan settlement demonstrates that EPA can effectively manage a CERCLA response action without 100% recovery of all response costs from a single PRP.

III. SUPPORTING DOCUMENTATION

Atlantic Richfield will agree to pay the proposed amount without disputing any of the costs set forth in the cost summaries provided by EPA. However, if EPA rejects Atlantic Richfield's offer, we request that EPA provide complete supporting documentation for the response costs listed in the summary reports provided on May 13. EPA is required under 40 C.F.R. § 300.160(a)(1) to "complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery," including "accurate accounting of federal, state, or private party costs incurred for response actions." Supporting documents to be provided include, without limitation:

- For Regional and Headquarters Payroll Hours and Payroll Costs: time sheets, including work descriptions, compiled in the same order as Payroll Costs are listed in the cost summaries.

- For Regional and Headquarters Travel Costs: travel authorizations and vouchers.

- For Contract Costs, including costs paid under Interagency Agreements and State Cooperative Agreements:

    - Site specific agreements, including cooperative agreements and grants;
    - Contractor vouchers, drawdowns, invoices, and other documentation of costs incurred;
    - Treasury schedules;
    - Work assignments and/or task orders;
    - Information detailing how contractor allocation rates were determined and how contractor voucher amounts were allocated to the site; and
    - Contractor deliverables, including progress/status reports, oversight reports, analytical reports, investigation reports

We also request information detailing how Payroll Costs, Travel Costs, and Contract Costs were allocated between OU1, OUs 2-7, and OU8. Atlantic Richfield needs to see documentation that will help to explain how EPA is allocating its labor and resources between the different operable units and whether or not costs legitimately chargeable to OU8 may have been included in the cost summaries for OU1 or OUs 2-7.

Atlantic Richfield needs this documentation to thoroughly evaluate the basis for the costs charged by EPA and to determine which costs should be disputed and which paid as undisputed. We are particularly interested in seeing documented justification for the fees and costs billed by CH2MHill ($510,381.82 for OU1), Tetra Tech EM, Inc. ($255,376.61 for OU1), the Yerington Paiute Tribe ($112,720.92 for OUs 2-7), and NDEP ($602,043.31 for OUs 2-7).

Until EPA accepts Atlantic Richfield's payment offer or such documentation is received and reviewed, Atlantic Richfield questions all of the charges identified in EPA's payment request and expressly reserves all rights and defenses that may be available to it with respect to these charges.

IV. ATLANTIC RICHFIELD'S DEFENSE TO JOINT AND SEVERAL LIABILITY

There are sound legal and technical grounds supporting Atlantic Richfield's defense to joint and several liability with respect to OU1. While EPA may disagree, Atlantic Richfield's compromise payment offer preserves that defense, while providing substantial payment to EPA—allowing EPA to in effect "refill its tank"—during a time when it cannot access the Superfund. We also can continue to evaluate whether the existing groundwater data and other analyses that Atlantic Richfield is currently performing—both as part of and independently of the RI—establish a reasonable basis for apportioning liability for the OU1 harm. EPA and NDEP have expressed an interest in completing that analysis, since it may have a bearing on remedy selection.

Under *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009), it is now well settled that joint and several liability is not mandated under CERCLA in every case. Where, as here, there is a reasonable basis for dividing environmental harm according to a party's contribution, joint and several liability does not apply, and a party will be held responsible only for the share of the harm it caused. *Burlington Northern* and rulings in other federal cases confirm that apportionment does not require absolute scientific certainty about what each party did or how much waste it contributed at a site. "The fact that apportionment may be difficult, because each defendant's contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability." *In re Bell Petroleum Serv., Inc.*, 3 F.3d 889, 903 (5th Cir. 1993).

As recently as last month, a federal court in Wisconsin held that a "reasonable estimate" of how much a party contributed to the contamination in an operable unit would suffice, on its own, to establish that the harm in a CERCLA case is theoretically capable of apportionment. *United States v. NCR Corp.*, 2015 WL 2350063 (E.D. Wis. May 15, 2015). The *NCR Corp.* court was responding to the Seventh Circuit's decision in *United States v. Glatfelter*, 768 F.3d 662, 678 (7th Cir. 2014), which held the harm associated with a single CERCLA operable unit "would be theoretically capable of apportionment" if one PRP could show the extent to which it contributed to the contaminant concentrations in the operable unit. Both courts held that such an estimate can in turn be used to apportion the costs of a remedial action, even where the same remedy is selected to address the contamination contributed by multiple PRPs.

At Yerington, the case for divisibility is strongest for OU8, where EPA recognizes that Arimetco is responsible for most or all of the releases of hazardous substances. This is one of the reasons why EPA has been pursuing NPL listing for the Site. As stated in EPA's Enforcement Addendum to the 2012 Removal Action Memorandum (page 18):

> EPA's data is limited regarding the presence and mobility of hazardous substances in [the Arimetco heaps] prior to Arimetco mobilizing heavy metals in the tailings with the addition of millions of gallons of acidic solution. This lack of data makes uncertain any enforcement action against [Atlantic Richfield] for liability regarding the Arimetco heaps and fluid system. Accordingly, EPA has been exploring the potential to add the Site the [NPL] to secure funding for remedial actions to address the heaps and fluid system.

From Atlantic Richfield's perspective, OU8 and OU1 are necessarily linked. It can hardly be argued that releases from OU8 and from Arimetco's operations at the Site are not contributing at least *some* of the hazardous substances measured in OU1 groundwater. This is evident in the findings reported in the 2012 Feasibility Study Report for OU8, among other sources of information; and it is just a matter of common sense that the massive, documented quantities of fluids spilled and leaked during Arimetco's operations are impacting groundwater quality at the site. If the harm associated with OU8 is capable of apportionment (and assignable to Arimetco), and if—as the OU8 Feasibility Report acknowledges[1] and as our analysis is confirming—releases of hazardous substances from OU8 are contributing to groundwater

[1] The May 2012 Draft Final Feasibility Study for Arimetco Facilities Operable Unit 8 (CH2MHIll, Inc.) states on page 1-14: "Potential areas affected by Arimetco operations include the footprints of each HLP and their associated drain-down FMSs, historical spill areas, and the SX/EW Process Area. On the basis of groundwater monitoring results, these impacts are thought to extend vertically down to groundwater, although the relative contributions from Arimetco versus other Site-related contaminant sources have not been determined."

contamination and the need for remedial action in OU1, it follows that the harm associated with OU1 must also be divisible.

So long as Atlantic Richfield can reasonably show the extent to which it and Arimetco each contributed to the groundwater contamination in OU1, the associated harm to the groundwater is capable of apportionment, and Atlantic Richfield cannot be held jointly and severally liable for OU1 response costs under CERCLA. Atlantic Richfield's technical team is developing the analysis to do just that—using sulfur isotopes, end-member analysis, and groundwater chemistry data to differentiate portions of the groundwater system where contamination can be attributed to Arimetco's, as opposed to Atlantic Richfield's, operations. And as we explained to EPA during the recent meeting in San Francisco (April 13, 2015), the analysis is confirming that, especially for shallow groundwater in the vicinity and downgradient of the VLT Heap Leach Pad and VLT Pond, releases from Arimetco's operations are the major contributor to the groundwater contamination in OU1. We are continuing to develop the factual record, chemical analysis, and statistics needed to quantify and differentiate Anaconda's and Arimetco's releases and determine their respective contributions to current groundwater conditions in OU1.

Since Arimetco's operations are contributing a certain, quantifiable portion of the groundwater contamination requiring remedial action in OU1, under *Burlington Northern*, *Glatfelter*, and now *NCR Corp.*, Arimetco must likewise be assigned a portion of the associated OU1 response costs. As stated by the court in *Glatfelter*, "a reasonable basis for apportionment could be found in the remediation costs necessitated by each party." 768 F.3d at 678. And based on what we currently know, Arimetco's contribution to groundwater contamination, at least in the portion of OU1 surrounding the VLT Pad and Pond, is substantial.

V. ACCOUNTING FOR FMS O&M COSTS

As we have tried to make clear in our recent discussions with EPA, one of the reasons that Atlantic Richfield is so strongly opposed to paying 100% of EPA's OU1 costs (in addition to the legal and technical merits of its divisibility defense) is the substantial and mounting cost of the work Atlantic Richfield is performing to operate and maintain the Arimetco Fluid Management System (the "FMS") in OU8 pursuant to the 2005 UAO (¶ 15.g) and the 2009 Administrative Order on Consent, Dkt. No. 09-2009-0010 (¶ 33.c). It is unreasonable to expect Atlantic Richfield to incur response costs for an operable unit for which EPA acknowledges it has limited or no liability, and then in addition to require payment of millions of dollars for EPA's OU1 costs without any recognition that these costs should be apportioned.

Atlantic Richfield's FMS work is extensive. As set forth in the 2010 FMS O&M Plan, Atlantic Richfield maintains and repairs the FMS ponds, trenches, and ditches; monitors and manages pond levels, inflow rates, and pumping rates; maintains the leak detection systems, flow meters, weir inflow level meters, and pond level transducers; operates and maintains the bird

deterrent system; performs sampling of drain-down solutions; and provides monthly and annual reports to EPA. According to billing records, Atlantic Richfield's external contractor costs from 2004 through 2014 for FMS O&M tasks were approximately $4.9 million (out of a total of approximately $106 million spent site-wide during that same period). In addition, Atlantic Richfield paid 50% of the extramural costs described in EPA's July 2, 2012 Action Memo—$420,000—for the re-lining of Arimetco's VLT pond and repairs to the heap leach perimeter ditches. And in 2013, Atlantic Richfield paid more than $600,000 to NDEP to partially fund construction of the two additional one-acre ponds needed to increase the storage capacity pf the FMS. That is the same project for which EPA is now deducting over $700,000 from its current payment demand because it acknowledges Atlantic Richfield should not be paying the associated costs.

FMS costs will only continue to grow because of the deteriorating condition of various system components. Storage capacity in the FMS Evaporation Ponds B and C is limited, and it will diminish as mineral deposits increase (similar to what happened to Pond A). Additional ponds will likely be needed in the next few years. Atlantic Richfield recently informed EPA of the need to test the liners in Ponds B and C for leakage due to high collection rates in the leak detection system in February 2015. The Phase I Pond is filling with mineral deposits, making pumping of fluid more difficult. The South Mega Sump liner appears to be damaged and leaking. The Phase III-4X Weir and ditch structure and the Phase III perimeter collection ditches are in poor condition.

Many of the aforementioned repairs are beyond the scope of Atlantic Richfield's obligations under the 2009 AOC, which clarifies in ¶ 33.c that Atlantic Richfield shall not be obligated to perform FMS repairs estimated to cost more than $25,000 per component or to replace components that have reached the expiration of their ordinary and expected useful life. EPA's 2012 Removal Action Memorandum (page 5) confirms that "none of these actions [ordered by EPA] require ARC to maintain the integrity of the Arimetco fluid management system, and ARC has asserted that is not liable for any contamination from the Arimetco operations." Even so, the poor condition of certain FMS components increases O&M costs, and Atlantic Richfield is growing increasingly concerned about how the FMS will be maintained long term and who will pay to keep it operating. Atlantic Richfield cannot be expected to shoulder these costs indefinitely.

Interestingly, EPA's November 6, 2009 letter to Singatse Peak Services ("SPS") (attached as Appendix E to the 2012 Settlement Agreement and Order on Consent) states that one of the "Reasonable Steps" that SPS should be taking to qualify for its defense under CERCLA's bonafide prospective purchaser provision, 42 U.S.C. §§ 9601(40), 9607(r), is maintaining the FMS and performing bird mitigation at the Site. As stated by EPA:

> Based on the information that EPA has evaluated, EPA believes that implementation of the activities stated below would be appropriate reasonable steps for Purchaser [SPS] with respect to the existing conditions of hazardous substance contamination. … Maintain heap fluid collection systems to prevent further discharges to groundwater (i.e., critical liner repairs) or overflow (i.e., standard operation and maintenance of fluid management systems), or as reasonably necessary to mitigate avian access to hazardous fluids. EPA has conducted and is planning to conduct response actions to improve the present conditions of the collection ponds, with the intent of ensuring that existing liners are in good current repair and the fluid management system is more efficient. Singatse may not need to maintain the heap fluid collection systems so long as another party is performing the heap fluid collection system maintenance. "

This statement begs the question why Atlantic Richfield, as opposed to SPS, continues to be required to maintain the FMS at a total cost exceeding $5 million? If, as stated here, FMS O&M obligations rightfully belong to SPS, and if Atlantic Richfield is not otherwise being held responsible for OU8 response actions, it is simply not fair to expect Atlantic Richfield to absorb and to continue paying the FMS-related costs. We bring this up in the current context because the FMS costs constitute a multi-million dollar portion of Atlantic Richfield's overall site expenditures and therefore factor into its willingness to reimburse EPA for its OU1 costs. Atlantic Richfield cannot, on the one hand, pay to keep the OU8 FMS operating and then on top of that also agree to pay EPA for OU1 costs legitimately attributable to Arimetco's OU8 releases.

In light of these concerns, Atlantic Richfield would consider an alternative settlement approach under which it pays a larger portion of EPA's past and future OU1 response costs but receives some sort of relief from its current FMS obligations. This could be memorialized in a new administrative order on consent that supersedes the 2005 UAO and the 2009 AOC, establishes a diminished O&M role for Atlantic Richfield, and adequately accounts for Atlantic Richfield's past FMS expenditures. Possible options could include transferring responsibility for fluid management or avian deterrence activities to another party; providing alternative sources of funding for FMS response actions, including payments from EPA, NDEP, and SPS; and/or crediting Atlantic Richfield's past and future FMS costs against its obligation to pay future EPA response costs.

Finally, as long as Atlantic Richfield and EPA are revisiting the 2005 UAO and 2009 AOC, other obsolete or soon to be obsolete requirements under those orders (such as maintenance of the pump-back system, domestic well monitoring, and the bottled water program) should also be modified, phased out over time, or terminated.

VI. CONCLUSION

Atlantic Richfield is presenting EPA with a fair and reasonable offer of payment for its unreimbursed past response costs. EPA will receive a substantial sum—$1,445,598.53, which can be used to pay for ongoing response actions at the Yerington site and partially offset the need to obtain funding from other sources. From Atlantic Richfield's perspective, any resolution of EPA's payment demand must account for the reality that Atlantic Richfield is not fully responsible for groundwater conditions in OU1 and for the substantial costs that Atlantic Richfield has unjustifiably incurred operating and maintaining the Arimetco FMS and related facilities in OU8.

The proposed payment approach provides EPA the opportunity to "refill its tank" while Atlantic Richfield and EPA complete the RI and consider appropriate remedial alternatives. Atlantic Richfield is not asking EPA to waive any rights or provide a covenant not to sue with respect to the un-paid OU1 costs. This approach is comparable to what was agreed to under the 2013 AOC and to the payment allocation that Atlantic Richfield and EPA agreed to for the Leviathan site.

In addition to resolving EPA's past cost demand, Atlantic Richfield also wants to work with EPA to develop a mutually acceptable approach for assigning responsibility for FMS O&M activities and accounting for Atlantic Richfield's substantial FMS costs. We also hope to work cooperatively with EPA to respond to NDEP's stated desire to expedite remedy selection and implementation in a way that allows all of the involved parties to craft a workable solution to the OU8 and OU1 "orphan share problem"—either with or without NPL listing.

Atlantic Richfield looks forward to further discussions on these issues with EPA, and we appreciate EPA's careful consideration of the information presented in this letter.

Sincerely yours,

Adam S. Cohen
for
DAVIS GRAHAM & STUBBS LLP

cc: Brian Johnson
Jack Oman
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James Nolan